

Exhibit C



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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,

CRIMINAL ACTION

Plaintiff,

v.

ROBERT A. BERKMAN, M.D.,

Defendant.

NO. 03-45-1 (JJF)

Wilmington, Delaware

Thursday, November 6, 2003 at 11:30 a.m.
SENTENCING HEARING

BEFORE: HONORABLE JOSEPH J. FARNAN, JR., U.S.D.C.J.

APPEARANCES:

BETH MOSKOW-SCHNOLL, ESQ.
Assistant United States Attorney

Counsel for Government

LAW OFFICES OF TERRY K. SHERMAN
BY: TERRY K. SHERMAN, ESQ.
(Columbus, Ohio)

Counsel for Robert A. Berkman, M.D.

Brian P. Gaffigan
Official Court Reporter

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P R O C E E D I N G S

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(Proceedings began at 11:30 a.m.)

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THE COURT: Good morning. Be seated, please.

6

MS. MOSKOW-SCHNOLL: Good morning, your Honor.

7

This is the time set for the sentencing in the case of United States of America vs. Robert A. Berkman. The defendant is present with his counsel, your Honor.

10

THE COURT: Thank you, Ms. Moskow.

11

Good morning. Dr. Berkman, do you want to step up? Mr. Sherman?

13

MR. SHERMAN: Good morning, your Honor.

14

THE COURT: Doctor, if you want to go to the other side of Mr. Sherman, I want to ask you a few questions.

16

Doctor, have you had the opportunity to review the presentence report with your counsel?

18

THE DEFENDANT: Yes, sir.

19

THE COURT: As I understand it, you don't have any objections to the recitations of fact in the report and the calculation of the guidelines?

22

THE DEFENDANT: No, I don't, sir.

23

THE COURT: All right. Thank you.

24

Mr. Sherman, I'll recognize you on behalf of Dr. Berkman.

1 MR. SHERMAN: Thank you, your Honor. Your Honor,
2 let me begin with by telling you we have brought with us
3 today, in accordance with the plea agreement \$84,448.06 for
4 restitution which we will, at the conclusion of the hearing
5 today, turn over to the Clerk's Office.

6 We have also brought with us \$42,224.03 which
7 is made payable to Health and Human Services. That's the
8 civil penalty that was reached as part of the plea agreement.
9 Finally, we have with us the \$100 assessment.

10 Your Honor, I have prior to today's hearing
11 submitted to you a sentencing memorandum and our motion for
12 downward departure and ask you to consider that together with
13 the government's motion for the downward departure.

14 My comments, your Honor, this morning on the
15 plane ride here, I had an opportunity to re-read the letters
16 that I attached to the sentencing memorandum. Those letters,
17 your Honor, were only a fraction of the letters that I
18 received in the context that I have received on behalf of
19 Robert Berkman. I thought of the many lives over the years
20 that Dr. Berkman has touched and saved.

21 And I know that. I know the things that are
22 mentioned in the letters and the sentencing memorandum to be
23 true, your Honor, because I am a patient of Dr. Berkman. He
24 has operated on me. He has been to my house in the middle of
25 the night when I was in pain and attended me. When my father

1 died, he was there to comfort me. When my son was struggling
2 in algebra and chemistry, he tutored him.

3 Of all the people I've been practicing criminal
4 defense for 31 years, your Honor, and all the people that I
5 met; and I met all kinds. I've had opportunity to represent
6 politicians and policemen and lawyers and doctors. I have
7 never in my life met a man who is more committed to his
8 patients, more committed to the medical well-being of the
9 people he treats.

10 What really saddens me, really saddens me, your
11 Honor, to the point I could shed tears in this courtroom,
12 is that in Ohio, as the result of this conviction, in all
13 likelihood he will lose his license. They won't care, and
14 they won't look at the underlying facts. They'll take his
15 license and he won't practice anymore. Not only will he lose
16 and his family lose but the hundreds of patients who depended
17 on him, including myself, will lose. I just tell you, your
18 Honor, this is probably one of the saddest days of my life.

19 THE COURT: All right. Thank you.

20 Dr. Berkman, is there anything that you would
21 like to tell me?

22 THE DEFENDANT: I'd like to apologize for what
23 happened. There is no question that I should have known
24 better. All my life, I wanted to be a physician, from a
25 child straight through to the present time. I dedicated

1 my life to both practicing medicine and teaching. I have
2 adhered to the oath that I have taken as a physician and also
3 my own personal desire to make a difference in society by
4 teaching. I do it volitionally. I do it without requiring
5 anything other than being able to give, that I continue to
6 do it. And it was my hope to have been able to continue
7 to do what I have done in terms of practicing medicine. It
8 was everything to me. It is everything to me.

9 Unfortunately, I should have known better but I
10 did not. I apologize. I'm sorry, more than anybody in this
11 courtroom can understand. I'm seeing my whole life going out
12 the window for something that I should have been aware of,
13 and I apologize wholeheartedly, sir.

14 THE COURT: All right. Thank you.

15 Ms. Moskow-Schnoll, do you have anything on
16 behalf of the government?

17 MS. MOSKOW-SCHNOLL: Your Honor, what also is
18 profoundly sad though is the other side of the story: The
19 fact this man committed a felony and despite his personal
20 wealth, he defrauded the Medicare system out of over \$84,000
21 by billing free samples. Thank you.

22 THE COURT: Okay. Thank you.

23 Doctor, I do understand, having sentenced two of
24 your colleagues for a similar offense from other states. If
25 there was anything I could personally do, in my capacity as a

1 judge, to avoid you losing your license to practice medicine,
2 I would do it. If I thought that I was permitted to go to
3 the Ohio Board of Medical Practice or whatever it's called,
4 I'd go there and tell them that they were misunderstanding
5 the circumstances of this case and that you should be allowed
6 to continue to practice medicine.

7 Also, I adopt everything Mr. Sherman said that
8 I can understand from the presentence report about you. I
9 accept what Ms. Moskow-Schnoll is saying about the \$84,000.
10 Interestingly, I took a look at your financial statement
11 as set forth in the presentence report. And I'm struck by
12 the fact that you're referred to as wealthy. Because when
13 I analyze your statement, you have a pension. That's your
14 wealth: \$2 million in a pension fund after all the years you
15 practiced medicine. When I look at the remainder of this
16 statement, you are not a wealthy man given the fact that most
17 people perceive doctors who would practice for the amount of
18 time you have are making seven figure incomes. When they
19 think you've accumulated wealth and financial independence,
20 basically what you are winding up with is a loss of license
21 and a \$2 million corpus for a pension. To me, that's not a
22 wealthy person.

23 I had a conversation with a doctor that treats me
24 the other day about the perception of physicians and wealth.
25 It's amazing what is perceived. And this is a person in an

1 academic setting. If folks really knew what, without
2 procedures, that doctor makes a year, they'd be shocked.

3 I've told the other doctors that in my view, the
4 perpetrator here was the drug company and the sales represent-
5 atives. I told the last doctor who was here if he felt that
6 he was being treat unjustly, his feeling is correct he was
7 being treated unjustly.

8 The only thing I can do is downwardly depart which
9 I'm going to do. I'm going to put you on probation for a
10 year unsupervised; and I'm going to trust that the judgment of
11 your peers will be that you shouldn't be suspended from the
12 practice of medicine.

13 There will be a transcript of this if Mr. Sherman
14 wants to take that and show it to them. I have a lot of
15 experience in the practice of law and I've been on the bench
16 over 18 years. It would be a real travesty if you weren't
17 allowed to treat patients -- a real travesty. And I think
18 my sentence reflects my view of your situation in this case.

19 Pursuant to the Sentencing Reform Act of 1984,
20 it is the judgment of the Court that the defendant, Dr.
21 Berkman, is placed on probation for a term of one year. The
22 defendant's term of probation is unsupervised.

23 This sentence reflects a downward departure from
24 the prescribed sentencing guidelines pursuant to United States
25 Sentencing Guidelines.

1 While on probation, the defendant shall not commit
2 another federal, state or local crime, shall comply with the
3 standard conditions that have been adopted by this Court and
4 comply with the following additional conditions:

5 Periodic mandated drug testing mandated by the
6 Violent Crime Control and Law Enforcement Act of 1994 is
7 suspended. The Court finds the offense is not a drug related
8 offense, and this defendant has no current or past history of
9 substance abuse.

10 The defendant shall not illegally possess a
11 controlled substance.

12 The defendant shall not possess a firearm or
13 destructive device.

14 The defendant shall pay any financial penalties
15 imposed by this judgment.

16 It is further ordered the defendant shall pay to
17 the United States a fine imposed of \$10,000. This fine can be
18 paid during the year of unsupervised probation on a schedule
19 established with the probation officer.

20 It's further ordered the defendant will make
21 restitution to the Department of Health and Human Services in
22 the amount of \$84,448.06 which may be paid during the course
23 of the year of probation. Restitution, when paid, will be
24 paid in payments to the Clerk of the Court, and then the Clerk
25 will forward it to the victim.

1 It is further ordered that Dr. Berkman pay to the
2 United States a special assessment of \$100 which will be due
3 immediately.

4 Dr. Berkman, I have to tell you that you have a
5 right to appeal this sentence if you think any part or all of
6 it is illegal. You can do that by letting Mr. Sherman know
7 or writing me a letter, and I would be surprised but if you
8 weren't able to afford a lawyer if you wanted to appeal,
9 I'll appoint one for you if you can't afford one.

10 Do you understand your right to appeal and your
11 right to counsel in that appeal?

12 THE DEFENDANT: Yes.

13 THE COURT: Good luck with the medical board there
14 in Ohio.

15 Mr. Sherman, is there anything further?

16 MR. SHERMAN: No. Thank you so much, your Honor.

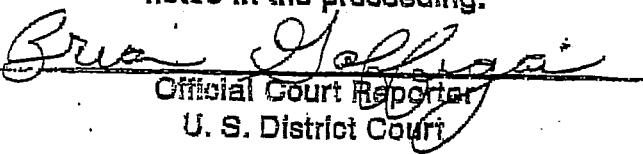
17 THE COURT: Ms. Moskow-Schnoll, is there anything
18 further?

19 MS. MOSKOW-SCHNOLL: No. Thank you, your Honor.

20 THE COURT: We'll be in recess.

21 (Sentencing hearing ends at 11:50 a.m.)

22
23 I hereby certify that the foregoing is a true
24 and accurate transcript from my stenographic
25 notes in the proceeding.


Brian Holligan
Official Court Reporter
U. S. District Court